OCT 8 1953
HAROLD B. WILLEY,

Supreme Court of the United States

OCTOBER TERM, 1953

No. 28

FEDERAL POWER COMMISSION,
Petitioner,

v.

NIAGARA MOHAWK POWER CORPORATION,
Respondent.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

FEDERAL POWER COMMISSION, *Petitioner,* v. NIAGARA MOHAWK POWER CORPORATION, *Respondent.*	No. 28.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 585) is reported in 202 F. 2d 190; the Commission's (R. 105) appears in 9 FPC 228.

Jurisdiction

The order of the Court of Appeals was entered December 31, 1952 (R. 614). The Petition for Certiorari was filed March 30, 1953, and was granted on May 18, 1953 (R. 617). The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act and 28 U.S.C. §1254(1).

Questions Presented

1. Did the Federal Water Power Act of 1920 abolish private proprietary rights to use waters from a navigable river?

2. Is the Federal Power Commission empowered to disregard arbitrarily payments made and obligations incurred by a licensee pursuant to long-standing contracts made at arm's length in acquiring water rights existing long prior to the passage of the Federal Water Power Act of 1920?

Statutes Involved

The statutes involved are adequately set forth in the Transcript of Record and in the Statutory Appendix.

Statement

This case directly raises the effect of the Federal Water Power Act of 1920, now Part I of the Federal Power Act (the Act), on water rights validly existing under state law. The Commission's order under review was made in a proceeding to determine amortization reserve liability of a licensee under Section 10(d) of the Act (R. 395-6). The order determined that Respondent,[1] as a licensee under the Act of Project No. 16 at Niagara Falls, New York, is required to accrue $914,432.04 to amortization reserve account as one-half of its surplus earnings from normal operations for the period March 2, 1941 to December 31, 1946, inclusive (R. 116), instead of $515,432.04 agreed to by Respondent (R. 7).

To the extent that amounts are transferred from time to time to amortization reserve account, Respondent's surplus and its earnings available for dividends and other corporate purposes are correspondingly reduced. In the event that the United States takes over the licensed

[1] Respondent is successor by merger, effected October 19, 1950, to The Niagara Falls Power Company, the original licensee under the license for Project No. 16 at Niagara Falls. Chart A showing Respondent's principal predecessors in title referred to herein appears at page 67.

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project at the expiration of the license, pursuant to Section 14 of the Act, the amortization reserve may be deducted from the original cost of the project in determining the amount to be paid to Respondent.

In arriving at its determination the Commission disallowed as operating expenses of Respondent its past payments of $99,000 per year to International Paper Company (R. 115), such payments being required by a long-standing contract whereby International Paper Company conveyed to Respondent by defeasible grant certain rights to use water,—called the International Paper Company rights.

Also, the Commission artificially increased Respondent's project revenues for those years—above the amounts actually received by Respondent—by disregarding Respondent's long-standing contractual obligation to provide electric energy to another company at cost as consideration for the lease by that company to Respondent of certain rights to use water,—called the Pettebone-Cataract rights (R. 114-5).

A. Historical background.

Respondent's remote predecessors in hydraulic power development at Niagara Falls acquired lands riparian to the Niagara River extending above and below the Falls, and constructed a hydraulic canal completed in 1861 which tapped the River nearly a mile above the Falls and conveyed water to a canal basin on the High Bank of the River approximately one-half mile below the Falls[2]. Later, Respondent's predecessor The Niagara Falls Power Company constructed another intake canal above the Falls extending only a short distance inland and a tunnel from a point under that canal and under the City of

[2] The photograph at R. 311 shows the hydraulic canal extending diagonally to the canal basin near the upper right corner.

Niagara Falls to the River below the Falls[3]. The proprietors of these canals conveyed various mill sites to others with rights to use water from the canals for generating power. The general method of power development at that time was to sink pits under the mills, and to use water from the canals to drive turbines at the bottom of the pits. Water from the hydraulic canal used by mill owners escaped from the pits through tunnels to the face of the High Bank and thence back into the River (R. 311-12, 475-6). The water used from the intake canal escaped through a short tunnel into the main discharge tunnel of the Power Company and thence back into the River (R. 491). Thus in the end no water was lost from the flow of the River.

B. The International Paper Company Rights.[4]

These rights had their genesis in 1891 when Respondent's predecessor The Niagara Falls Power Company leased and later conveyed to a predecessor in title of International Paper Company land on the bank of the Niagara River adjacent to the Power Company's intake canal, together with the right to take and use a limited amount of water from that canal or from the River. The various deeds and agreements defining this water right are fully set forth in the Record (R. 168-219) and are well summarized in the opinion below (R. 588-9). Suffice it to say here that this Court has characterized this water right of the Paper Company as "a right that by the law of New York was a corporeal hereditament and real estate." *International Paper Company v. United States*, 282 U. S. 399, 405 (1931).

[3] The drawing at R. 491 shows this intake canal and tunnel.

[4] Chart B showing the descent of these rights appears at page 68.

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By agreement in 1919, as amended in 1937, the Paper Company has conditionally granted and released to Respondent this right to take and use 730 cubic feet per second (cfs) of water, and Respondent has agreed to furnish to the Paper Company a specific amount of electric energy and to make annual payments by way of rental value for the water (R. 220, 240). But the grant is conditioned upon the continuance of the supply of the specified amount of electric energy by Respondent; if that fails for a period of ninety days, the Paper Company has the option to revive its right to take and use 730 cfs of water. Respondent paid the Paper Company for the use of this water $99,000 per year during the period from March 1941 through December 1946 and it is these payments that the Commission has now disallowed on the erroneous theory that the Paper Company rights no longer exist.

C. The Pettebone-Cataract Rights.[5]

Prior to 1879 predecessors in title of The Pettebone-Cataract Paper Company and the Cataract City Milling Company (the Pettebone-Cataract companies) acquired from Respondent's predecessors certain mill sites on the High Bank of the Niagara River below the Falls adjacent to the hydraulic canal, together with rights to use limited amounts of water from that canal for the generation of power (R. 294). In 1900 those companies and the proprietor of the hydraulic canal by contract fixed the amount of water to which the Pettebone-Cataract companies were entitled at 262.6 cfs at a head of 100 feet (R. 320-1, 333-5). This was only a partial head, as the canal basin was about 215 feet above the river level; so the canal owners reserved the right to enter on the Pettebone-Cataract lands and construct a tunnel within the

[5] Chart C showing the descent of these rights appears at page 69.

High Bank to collect the water discharged by those companies and utilize it through the remaining 115 feet of fall.

It was not until 1914 that the proprietor of the canal took steps to construct this tunnel. The Pettebone-Cataract companies refused to permit such construction, as a result of which a suit was brought to enjoin them from interfering. The New York courts upheld the right of the canal owners to construct upon the Pettebone-Cataract lands facilities necessary to utilize the remaining head and awarded damages of approximately $172,000 against the Pettebone-Cataract companies for their breach of the 1900 contract. *Hydraulic Power Company* v. *Pettebone Cataract Paper Company,* 112 Misc. 528 (1920), *affirmed,* 198 App. Div. 644 (1921) (R. 317-36). In that litigation the Appellate Court recognized and affirmed the validity of the Pettebone-Cataract rights to utilize water from the canal basin (R. 332).

While that litigation was in progress, the Federal Water Power Act was enacted on June 10, 1920. The Niagara Falls Power Company, then owner of the canals, applied for a license thereunder and set forth the construction necessary to utilize the outfall of the turbines of the Pettebone-Cataract companies through the remaining head of 115 feet (R. 337-9, 340-7, 349, 350). During the pendency of the appeal in the litigation between the Power Company and the Pettebone-Cataract companies, the Federal Power Commission in 1921 issued to the former the Project No. 16 license which is here involved. The license contained the following:

> "13. In the event that the United States or a new licensee shall take over the project of the licensee pursuant to the provisions of the Act,
>
> * * * * *
>
> Such taking over of the project shall also be subject to the rights, if any, of Pettebone-Cataract

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> Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic canal or basin of licensee, and to the rights, if any, of International Paper Company." (R. 384)

The Pettebone-Cataract companies continued to divert and use water from the hydraulic canal through the fall of 100 feet for the production of power until 1925, four years after the Project No. 16 license was issued.

In 1925 the properties of the Pettebone-Cataract companies, including lands, buildings, machinery and water rights, were sold to Niagara Lockport and Ontario Power Company. As consideration therefor, Niagara Lockport assumed the judgment debt of about $172,000 owed to The Niagara Falls Power Company by the Pettebone-Cataract companies (R. 273) and issued to the Pettebone-Cataract companies $700,000 par value of its 7% Preferred Stock (R. 295). Thereafter Niagara Lockport conveyed to the Power Company the lands, buildings, plant and machinery (but not the water rights) in satisfaction of the judgment debt which it had assumed. The Power Company accepted the conveyance as extinguishing the debt. Simultaneously it leased the water rights from Niagara Lockport and, as the consideration therefor, agreed to furnish Niagara Lockport a stated amount of electric energy, for which the latter was to pay at cost (R. 286). These transactions were laid before and approved by the New York Public Service Commission (R. 272-80). Since that time the Power Company has utilized the 262.6 cfs of water.

In 1945 Niagara Lockport was consolidated into Buffalo Niagara Electric Corporation, which thereupon succeeded to the Pettebone-Cataract rights. It was then proposed that Buffalo Niagara sell to the Power Company its

rights in the 262.6 cfs for $728,415.48, the cost to Niagara Lockport when it had acquired the water rights from the Pettebone-Cataract companies (R. 269-72, 292-4). The New York Public Service Commission approved and authorized the transfer in February, 1947 (R. 302), reviewing the history of these rights at length (R. 260-304) and concluding that the price of $728,415.48 therefor was originally fixed "by arms length bargaining between two non-affiliated parties." (R. 301). After that approval the companies filed a declaration with the Securities and Exchange Commission, under the Public Utility Holding Company Act of 1935, for consent to or approval of the transaction as a sale of utility assets; and in February 1947, that Commission entered an order permitting the declaration to become effective (R. 309).

The Power Company also requested the Federal Power Commission to agree to the amendment of paragraph 13 of the Project No. 16 license, quoted above at pp. 6-7, so as to record the effect of its acquisition of the Pettebone-Cataract water rights from Buffalo Niagara, by eliminating therefrom the reference to "rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic canal or basin of licensee * * *." This request was in conformity with the provision of the Federal Power Act that licenses thereunder may be altered only upon mutual agreement between the licensee and the Commission. Act, Sec. 6. In November 1947, the Commission refused to agree to the amendment saying in its Opinion No. 159 (R. 389):

> "In our opinion Buffalo Niagara Electric Corporation does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 66. * * *

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> The licensee already has the right, under the license, to use the 262.6 c.f.s. which is the subject of its petition, and it is futile for it to attempt to purchase that which it already possesses to the fullest extent of the law."[6]

Subsequently, in the proceeding to determine amortization reserve liability which gave rise to the present case, the Commission artificially increased Respondent's operating revenues from the period from March 1941 through December 1946 by the difference between the price paid by Niagara Lockport and Buffalo Niagara for power supplied to them under the 1925 agreement and Respondent's normal rates. This artificial increase amounted to $37,800 annually (R. 32, 109).

D. The Basis of the Commission's Action.

The Commission's Opinion No. 200 (R. 105) disposes of both issues summarily: The International Paper Company issue "is fully controlled in legal principles and result by the holding * * * regarding the Pettebone-Cataract claim." (R. 110); as to the latter claim, "Opinion No. 159 fully controls. Licensee cites no valid contra law." (R. 109).

Thus the basis of the Commission's holding is Opinion No. 159 (R. 387); and the core of that opinion is the statement that Buffalo Niagara does not possess any lawful title to the water rights in question for the reason that there cannot be private ownership of the waters of a navigable river of the United States.

This is the sole ground of the Commission's action. There was not, nor could there be, any attack upon the

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[6] The Commission in the Court below asserted that its Opinion No. 159 was *res judicata* in the present proceeding, a contention rejected by the Court (R. 594) and which we do not understand the Commission reasserts here (Br. 9).

agreements relating to the Pettebone-Cataract and Paper Company rights on any ground of improvidence, fraud, illegality or other infirmity.

Summary of Argument

The present controversy arises from an attempt by the Commission, arbitrarily and in violation of the Fifth Amendment, to disregard obligations under subsisting contracts made in acquiring water rights. The fundamental and egregious error of the Commission lies in construing a regulatory statute as a confiscatory enactment. The court below, in reversing the Commission, properly held this construction to be a misconception of the Federal Power Act and of the nature of the licenses issued thereunder.

The following propositions form the background for our argument that the International Paper Company and Pettebone-Cataract rights were not destroyed by the passage of the Act in 1920. Since the Revolution proprietary rights to use water for power purposes have had their source in and have been determined by State law. In New York, the right to use the waters of a flowing stream for power purposes arises by operation of law and as incident to ownership of the bank. Such a right is, in New York, a corporeal hereditament and real property and may be severed from the land and granted or conveyed in whole or in part. Furthermore, the rights of International Paper Company have been specifically recognized as valid proprietary rights by this Court and those of the Pettebone-Cataract companies by the courts of New York.

Federal regulation of the use of waters from the Niagara River under the Act has not destroyed private

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proprietary rights to such use valid under the law of New York, nor has the Act empowered the Commission to disregard payments made and obligations incurred in acquiring such rights. The Act itself contains no provisions abolishing water rights; to the contrary, many sections of the Act expressly recognize the existence of water rights. Moreover, the legislative history of the Act shows a clear intention not to infringe on any rules of property of the States with respect to the diversion of water. Indeed, the weakness in Petitioner's interpretation of the Act as confiscatory is perhaps most clearly demonstrated by the dearth of legislative history cited in support thereof.

The authorities construing the Act interpret it as an instrument of regulation and not of confiscation. And this Court has expressly held that the Act was not intended to interfere with the validity of water power rights existing under the law of New York and that a licensee of the Commission may not impair such rights without paying compensation therefor. *Ford & Son, Inc.* v. *Little Falls Fibre Company*, 280 U. S. 369 (1930). And Petitioner's reliance on *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53 (1913) is misguided for in that case Congress had enacted a statute expressly declaring that ownership in fee of certain property by the United States was necessary for a navigation improvement—a totally different concept from that underlying the Act which set up the Commission as a regulatory body.

ARGUMENT

I

The rights of private persons to the use of waters of a navigable stream are property rights deriving from state law and the rights here in question were validly created in accordance with the law of New York.

We begin with the following propositions correctly decided by the court below.

A. There is no claim here to ownership of navigable waters (R. 594).

The rights here in question are rights to use temporarily for the production of power waters drawn from Respondent's artificial canals, and then returned to the Niagara River. This *use* of the waters is a very different thing from the concept of *ownership* of the waters themselves. The distinction is fundamental, as pointed out in *Sweet* v. *City of Syracuse, et al.*, 129 N. Y. 316, 335 (1891):

> "It is a principle, recognized in the jurisprudence of every civilized people from the earliest times, that no absolute property can be acquired in flowing water. Like air, light, or the heat of the sun, it has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion or control. As Blackstone observes (2 Bl. Com. 18): 'Water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can have only a temporary, transient, usufructuary property therein.' While the right to its use, as it flows along in a body, may become a property right, yet the water

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itself, the *corpus* of the stream, never becomes or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquired, or become the subject of transmission from one to another. Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein, * * *."

B. Proprietary rights to use water for power purposes are derived from and determined by State law (R. 595).

It was early established in *Martin* v. *Waddell*, 16 Peters (41 U. S.) 367, 410 (1842):

> "* * * when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

And this Court recently recognized the distinction between "*dominium* (ownership or proprietary rights) and *imperium* (governmental powers of regulation and control)"[7] and quoted from *United States* v. *Oregon*, 295 U. S. 1, 14 (1935), as follows:

> "'Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See *Massachusetts* v. *New York*, 271 U. S. 65, 89. For that reason, upon the admission of a State to the Union, the

[7] *United States* v. *Texas*, 339 U. S. 707, 712 (1950).

> title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.' " (339 U. S. at 717)

Thus, the States retained their proprietary rights in inland navigable waters, that is, their *dominium*; and ceded to the Federal Government only certain powers of regulation and control over such waters.

Also well established is the proposition that the nature and extent of proprietary rights of riparian owners in navigable waters within the State and to the soil beneath are matters of State law, to be determined by the statutes and judicial decisions of the State. *Barney* v. *Keokuk*, 94 U. S. 324, 338 (1876) (Mississippi River); *United States* v. *Rio Grande Dam and Irrigation Company*, 174 U. S. 690, 702-703 (1899); *Fox River Paper Company* v. *Railroad Commission*, 274 U. S. 651, 655 (1927); *Kaukauna Water Power Company* v. *Green Bay & Miss. Canal Company*, 142 U. S. 254, 272 (1891); *Kansas* v. *Colorado*, 206 U. S. 46, 93-94 (1907); *United States* v. *Cress*, 243 U. S. 316 (1917); *Massachusetts* v. *New York*, 271 U. S. 65, 85-6, 89 (1926) (Lake Ontario).

In the *Cress* case, this Court stated the rule succinctly as follows:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks [citations], subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of com-

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merce among the States and with foreign nations [citations]; * * *." (243 U. S. at 319-20)

C. The International Paper Company and Pettebone-Cataract rights are valid usufructuary property rights under the law of New York (R 608).

In New York, the right to use the waters of a flowing stream for power purposes arises by operation of law as incident to the ownership of the bank and is a part of the estate of the riparian owner. *United P. B. Company* v. *Iroquois P. & P. Company,* 226 N. Y. 38, 46 (1919); *Waterford Electric Light, Heat and Power Company* v. *The State of New York,* 208 App. Div. 273, 283 (1924); *aff'd without opinion,* 239 N. Y. 629 (1925).

Such a right is, under the law of New York, a corporeal hereditament and real property, *Van Etten* v. *The City of New York,* 226 N. Y. 483 (1919); and the right of one of Respondent's predecessors, Niagara Falls Hydraulic Power and Manufacturing Company, to divert water from the Niagara River has been so characterized. *People ex rel. Niagara Falls Hydraulic Power and Manufacturing Company* v. *Smith,* 70 App. Div. 543 (1902), *aff'd without opinion,* 175 N. Y. 469 (1903). There the decision, as to whether the water rights of the power company should be included in the assessed value of its property for tax purposes, depended on whether such rights constituted real property or merely a franchise. Said the Court:

> "The relator, as a riparian owner and as owner of the lands under the waters of the Niagara River adjacent to its uplands from which the water is immediately taken, has the right to the use of the waters of the river for manufacturing purposes, and to divert the same for that purpose, returning them to the river, as it does, after passing over its own lands [citations], subject only to the para-

> mount right of the State to utilize these waters for a public use, without compensation to such riparian owners; all riparian rights remaining unimpaired until the exercise of such paramount right by the State. This being so, it appears that the relator, as riparian owner, had the right to take waters from the Niagara river for manufacturing purposes, not interfering thereby with the navigability of the stream, such right being in no sense in the nature of a franchise but a corporeal hereditament, not depending either upon grant or prescription." (70 App. Div. at 546)

Of the character of private rights in the use of water, the Court said in *Tracy Development Co.* v. *Becker,* 212 N. Y. 488 (1914):

> "Water is not land. It is an incident to land which gives to the owner of the land certain rights and privileges in the use of the water. If it flows over his own land it is so far identified with the realty as to be a corporeal hereditament; and if the right is to use it as it flows over the lands of another it is an incorporeal hereditament. In either event the right of property in the water is usufructuary. It is not an ownership in the fluid as such, but the right to its flow for the various lawful uses to which it may be subjected. Since such an hereditament is incident to land, it naturally passes with land, and, therefore, it is properly classified as real property in the 'Real Property Law', in the 'Statutory Construction Law' and in the 'Tax Law.'" (p. 499-500)[8]

[8] "The terms 'real property' and 'lands' as used in the first eight articles of this chapter are co-extensive in meaning with lands, tenements and hereditaments." N. Y. Real Property Law, §2.

"The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal." N. Y. Gen. Const. Law, §40.

Also, the N. Y. Conservation Law §613 (12) defines real property as follows:

"'Real property' without words of limitation, includes all uplands, lands under water, waters of any lake, pond or stream, all water and riparian rights or privileges, * * * and all land, water and rights necessary to carry out any project or development provided for by this article, including the right to divert running water of any stream or streams * * *."

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Specifically, Respondent, as a riparian owner, has a right under New York law to divert and use water from the Niagara River for power purposes. Such a right is, under the above authorities, a corporeal hereditament and real property. Moreover, the rights of Respondent's predecessors in title have been specifically confirmed and defined by a series of New York statutes,[9] none of which has ever been repealed.

Under New York law, a riparian owner's right to use the waters of a navigable stream can be severed from the land and granted or conveyed by the owner thereof in whole or in part, as was done in the instant case. *United P. B. Company* v. *Iroquois P. & P. Company,* 226 N. Y. 38, 46-7, 49 (1919).

Furthermore, the courts of New York have characterized the Pettebone-Cataract rights thus:

> "The defendants [Pettebone-Cataract companies] by mesne conveyances (the details of which are not of controlling significance) are respectively the owners of certain water rights, by virtue of which they take and have for years taken quantities of water from such basin and conducted the same to turbines upon their properties and thereby generated electrical power for their own private uses." *Hydraulic Power Co. of Niagara Falls* v. *Pettebone-Cataract Paper Co.,* 198 App. Div. 644, 646 (1921) (R. 332).

That is clear judicial approval of the validity of the Pettebone-Cataract companies' rights to utilize water from the canal basin. Those are the very rights which Petitioner now argues no longer exist.

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[9] N.Y.L. 1886, c. 489; L. 1889, c. 109; L. 1891, c. 253; L. 1892, c. 513; L. 1893, c. 477; L. 1896, c. 968; L. 1918, c. 597; R. 396-408.

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The same general principles apply to the International Paper Company water rights. Specifically, those rights were described by this Court in *International Paper Company* v. *United States,* 282 U. S. 399, 404-5 (1931), as follows:

> "The Niagara Falls Power Company by private grant to it, Letters Patent from the State of New York and acts of the Legislature of that State, was the owner so far as the law of New York could make it owner of land and water rights on the American side of the River above the Falls. Included in them was a power canal through which the Power Company was authorized to divert 10,000 cubic feet per second, at the time of the alleged taking. From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second,—a right that by the law of New York was a corporeal hereditament and real estate."

The right of the Paper Company there described is the very right later acquired by Respondent, by defeasible grant conditioned on annual payments—payments which Petitioner now claims should be disallowed on the erroneous theory that the right of the Paper Company no longer exists.

The foregoing principles clearly establish that both the Pettebone-Cataract and the International Paper Company water rights are usufructuary rights based on riparian ownership and recognized as corporeal hereditaments and real property. These settled principles completely destroy Petitioner's studied attempts to undermine these rights by contending that they were acquired under revocable state statutory grants and are not based on riparian ownership (Br. 5, 6, 49, 51). We shall have more to say later about this attempted slander of title. Suffice

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it to say here that Petitioner's arguments on this score were decisively rejected by the court below in holding that both the Pettebone-Cataract and International Paper Company rights depend on original riparian rights (R. 597) and that Petitioner was incorrect in asserting that neither the owners of those water rights nor their predecessors owned any riparian land to which the water rights are appurtenant (R. 608). Petitioner's brief does not so much as mention that portion of the opinion below or attempt to contest its validity; rather, Petitioner simply persists in its incorrect statements of the facts regarding the origin of the water rights in question.

Equally unfounded is the assertion that a distinction between private ownership of flowing waters and usufructuary property rights—long recognized at common law—"accords to private interests first mortgages on the water power of the Nation, and elevates those interests above the Federal Government and the consumer" (Br. 24). This is nothing short of a contention that private rights must be regarded as non-existent if they happen to conflict with an unbridled and unauthorized assertion of power by a Federal agency as here. To the contrary, under our system of law private rights continue to exist and will always be protected against an attempted Federal usurpation. *Youngstown Sheet & Tube Company et al.* v. *Sawyer,* 343 U. S. 579 (1952). Only if the intent to appropriate is clear and manifest will the exercise of Federal power be regarded as superseding private property rights, and then only for a proper constitutional purpose; nor can this fundamental concept be evaded by Petitioner's complaining that to recognize private rights is "to raise the formalistic terminology of property law to the level of federal power." (Br. 20). In the case at bar the intent of the Act is to establish Federal regulation, not confiscation, of privately-owned rights to use water for power purposes.

II

Federal regulation of the use of water from the Niagara River for power purposes has not destroyed private proprietary rights to such use valid under New York law, nor has the Federal Power Act empowered the Federal Power Commission to disregard payments made and obligations incurred in acquiring such rights.

It cannot be too strongly emphasized at this point that the sole question here is whether the Federal Government *has exercised* its powers over navigable waters so as to confiscate the rights before this Court. The test is what *has* been done and not what *may* be done. We do not ask that this Court reverse its holding in *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53 (1913) that water rights of riparian owners are subject to a non-compensable taking by the United States acting in the proper exercise of its power to improve navigable waters. That issue is not present here. The Court below correctly defined the issue before it to be whether the United States has exercised its paramount authority so as to accomplish the taking of these rights—not whether it could do so (R. 600). We turn to a consideration of the applicable statutes.

A. Regulatory measures prior to the Act.

The Rivers and Harbors Act of 1899 prohibited the creation of obstructions to or interference with the navigable capacity of any of the waters of the United States unless approved by the Federal Government. Federal regulation of amounts diverted from the Niagara River began in 1906 when Congress passed the Burton Act (R. 416) pro-

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hibiting such diversions except under permit from the Secretary of War. Under that Act, permits could be issued only to individuals, companies or corporations then actually producing power from the waters of the River. The maximum amount of all such permits was not to exceed 15,600 cfs. Respondent's predecessors in title applied for and received such permits (R. 436, 356). That Act also contained a provision requesting the President to open negotiations with Great Britain for the purpose of effectually providing by treaty for such regulation and control of the waters of the Niagara River as would "preserve the scenic grandeur of Niagara Falls" (R. 418).

The International Boundary Waters Treaty between the United States and Great Britain limiting the diversion of water from the Niagara River was proclaimed in 1910 (R. 438). The Court below correctly observed that the only purpose of the two Governments in restricting diversion of waters from the Niagara River was to prevent the level of Lake Erie and the flow of the River from being appreciably affected by diversion for power purposes and that the parties desired to accomplish this objective with the least possible injury to investments which had already been made in the construction of power plants on the United States side of the River under grants of authority from the State of New York (R. 603).

The Burton Act as extended by Congressional Joint Resolutions in 1909, 1911 and 1912 and the permits granted thereunder to Respondent's predecessors expired in 1913 (R. 358-9, 437, 452-4). Soon thereafter, the Attorney General of the United States rendered an opinion (R. 360) that diversions from the Niagara River—if in such quantity as substantially to interfere with its navigable capacity —were prohibited under the Rivers and Harbors Act of 1899 unless approved by the Secretary of War. Thereupon the War Department wrote The Niagara Falls

Power Company that it made no objection to existing diversions in amounts authorized under the Burton Act (R. 455). This letter, which specifically refers to the Rivers and Harbors Act of 1899, is wholly ignored in Petitioner's studied statement that from 1913 to 1917 diversions were made "in spite of the prohibition" of that Act (Br. 58).

In 1917 Congress authorized the Secretary of War to issue permits to individuals, companies or corporations then actually producing power from the waters of the Niagara River for additional diversions, the total amount in no event to exceed the 20,000 cfs maximum set by the International Boundary Waters Treaty (R. 457); and under that warrant the Secretary of War issued permits to Respondent's predecessors in title authorizing additional diversions (R. 365-6, 459, 462).

It should here be noted that it was in December 1917 that the Secretary of War requisitioned the total output of electric power of The Niagara Falls Power Company (R. 463) and shortly thereafter he informed it that the requisition order was intended to cover all water being diverted by it, including water being taken from its intake canal by the International Paper Company. The loss of this water caused a shutdown of the Paper Company's plant and consequent losses. The Paper Company brought suit to obtain compensation for such losses, on the ground that the requisition order constituted a taking of private property for a public use within the meaning of the Fifth Amendment. *International Paper Company* v. *United States*, 282 U. S. 399 (1931). It was in this litigation that this Court characterized the rights of the Paper Company which Petitioner now claims do not exist as "a corporeal hereditament and real estate" (p. 405) and held that "the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and

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for which it was bound by the Constitution to pay." (p. 407). Apparently, the Commission no longer contends that the decision of this Court in that case does not pass upon the validity of the Paper Company's water rights (Br. 49 n. 41, R. 110). We therefore here assume that the Commission concedes the correctness of the decision below in that respect (R. 597).

In June 1918, Congress by Joint Resolution again prohibited diversion of water from the Niagara River for the creation of power except under a permit from the Secretary of War (R. 465). The Secretary was authorized to issue permits, revocable at will, to individuals, companies or corporations then actually producing power from said waters. A permit was issued to The Niagara Falls Power Company (R. 466). The Joint Resolution, which was by its terms to terminate on July 1, 1919 or such earlier date as Congress enacted legislation regulating and controlling diversions from the Niagara, was extended to July 1, 1920, subject to the same condition as to earlier termination (R. 468). The Power Company's permit was also extended (R. 469).

B. The Federal Water Power Act of 1920.

The Federal Water Power Act, now Part I of the Federal Power Act, became law June 10, 1920. Petitioner asserts that the Federal Water Power Act eliminated all private proprietary rights to use water for power purposes (Br. 21); indeed, the Act is variously said to have "destroyed", "eradicated", "abolished", "wiped out" and "terminated" all such rights country-wide. But this catalogue of confiscatory labels is derived from the dictionary and not from the Act. To the contrary, the express terms of the Act, its legislative history and the authorities construing it plainly demonstate otherwise. Control, not confiscation, is the keynote of the Act. As this Court

recently said, the objective of the Act was "the creation of a commission with functions and powers comparable to those of the Interstate Commerce Commission in the field of transportation." *United States ex rel. Chapman* v. *Federal Power Commission, et al.*, 345 U. S. 153, 168 (1953).

We need look no further than the face of the statute itself to discover that Congress, in creating the Federal Power Commission as a regulatory body, did not intend the destruction of state-created water rights.

For example, Section 3(11) defines the word "project" as a "complete unit of improvement or development, consisting of a powerhouse * * * and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit; * * *"

Section 4(b) empowers the Commission, in determining original cost and net investment in a project, to require licensees to file a statement showing "the price paid for water rights" as well as lands and interests therein.

Section 9(b) requires that each applicant for a license submit evidence that it has complied with the requirements of State law "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes * * *."

Section 10(c) provides that each licensee "shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, * * *."

Under Section 14 it is provided that for purposes of determination of the amount to be paid by the United States in the event of taking over a licensed project after the expiration of the license, "the values allowed for water

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rights" shall not be "in excess of the actual reasonable cost thereof at the time of acquisition by the licensee"—thus evidencing a clear intendment that the payment then to be made shall allow a value for water rights.[10]

Again, Section 21 provides that when any licensee cannot acquire by contract the property of others necessary to a power project, it may acquire the same by the exercise of the right of eminent domain—thus recognizing the necessity of a licensee acquiring adverse property rights such as water rights by condemnation (which imports compensatory payment) if not by contract.

Finally, Section 27 provides that "nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Would any of these sections have been written into the Act had it been the purpose of Congress to wipe out private rights? It is no answer to suggest that Sections 3(11) and 14 "may easily be read" to support Petitioner's view of the Act (Br. 48). The issue is not to be resolved by a mere speculative reading of selected portions of the Act. Rather, the question of whether the Act did by its terms and was intended to wipe out all private water rights is to be decided in the light of plain words of the

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[10] In the proceeding below before the Commission, Commissioner Smith in dissenting said (R. 118):

> "This language [of Section 14], together with other pertinent provisions of the Act constituted, in my opinion, recognition by the Congress in 1920 that valid rights to make use of water for power purposes existed and had been transferred and acquired for *bona fide* payments at arms length and in accordance with the customs and general understanding of the law at that time."

statute itself, read in the setting of its legislative history and the authorities construing it.

C. Legislative history of the Act.

The fundamental weakness of Petitioner's position is perhaps most clearly demonstrated by the dearth of legislative history to support its view. Unable to point to any persuasive legislative history during the many years of Congressional consideration preceding the passage of the Act, Petitioner is forced to turn to its notions of the purposes and the theory of the Act (Br. 22, 25-30). The striking weakness in this portion of the brief is that the only authority the Commission can muster in support of its contention that Congress asserted its dominant servitude in water power rights in navigable water (Br. 25), is a single remark of Representative Anderson using the word "recapture" (Br. 28-9) and language from two veto messages delivered several years before Congress began consideration of federal power bills in 1913 (Br. 26-7). It is true that the conservationist philosophy expressed in the two veto messages of President Theodore Roosevelt was one of the factors that led to Congressional consideration of water power legislation; but it is far from correct to suggest, as does the Commission (Br. 26-30), that Congress wholly embraced that philosophy and carried it into the Act in such a way as to constitute all private water rights "governmental assets" (Br. 29). Rather, the Act was designed to set at rest the uncertainties created by that philosophy which had hampered the development of power projects by private interests, as shown below. As for the remarks of Representative Anderson, a member of the House Committee on Water Power which reported the bill, their full text discloses that he later described the

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Act as an instrument of "regulation" and "control". 56 Cong. Rec. 9282 (1918).

The fact is that Petitioner's argument largely ignores the legislative background of the Act, perhaps because it is at variance with Petitioner's theoretical notions as to the purposes of the Act. For the clear Congressional intent was that of "encouraging private enterprise and the investment of private capital" in power projects, consistent with the public interest. H.R. Rep. No. 61, 66th Cong., 1st Sess. 3 (1919); Sen. Rep. 180, 66th Cong., 1st Sess., *passim* (1919); *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152, 180-1, n. 23 (1946). The same purpose is reflected in the statement of Secretary of Agriculture Houston, quoted in both the foregoing Reports, that the bill proposes a method by which the water powers of the country can be developed "under conditions which will give the necessary security to the capital invested", while at the same time protecting the public interest.

During the Congressional debates a fuller explanation of the reasons for the Act was presented by Representative La Follette, a member of the House Committee on Water Power which reported the bill. He said:

> "This, Mr. Chairman, brings me back to my first premise: That we should understand the genesis of this legislation; the reason for its coming into being and need for its enactment.
>
> We have for many years been trying to develop more or less power from rushing or falling water in many states of the Union, and many power possibilities would have long ago been developed and be giving service to man if it were not for a divided authority. While the right of water control and the ownership and jurisdiction of bed and banks of our watercourses are admittedly in the States, the jurisdiction over the navigation of all streams being in the Government the States could

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not well pass laws conferring upon private individuals rights to build dams across the streams, because the Government could intervene and stop proceedings under the plea of control of navigation.

* * * * *

Building dams and developing water powers is usually a hazardous and costly undertaking. Men will not engage in it on uncertainties. Consequently with indefiniteness of tenure and occupation created by dual or divided authority but little development had been made.

* * * * *

This bill is brought here because it is apparent that we can get no development under a divided authority, and development is needed. * * * *This bill is not based on either the Government's ownership or its sovereign authority*, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as not to infringe any of the rights of the States nor to impede or restrict navigation, but rather to benefit it. * * * *Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction* for the period covered by any license, the State having exercised its rights in advance of issue.

* * * * *

By the enactment of this bill we shall be able to develop our water powers, *recognizing the States' rights as to water, bed, and bank control.* * * *" 56 Cong. Rec. 9109-10 (1918). (Emphasis added)

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As evidence that the bill was not intended to interfere with the jurisdiction traditionally held by the states over proprietary rights, Representative La Follette later pointed to Section 9(b) which provides:

> "* * * each applicant for a license hereunder shall submit to the commission—
>
> * * * * *
>
> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes * * *."

Of that section he remarked:

> "* * * in this section * * * we are trying not to infringe the rights of the States in that respect, and I wish to call the attention of the committee to the fact that many Supreme Court decisions in respect to States' rights as to water also refer to States' rights as to the beds and banks, and I would like to read from the latest United States Supreme Court decision upon this question, delivered on May 12, 1917 [*United States* v. *Cress,* 243 U. S. 316, cited at p. 14 above]. The opinion was delivered by Mr. Justice Pitney, and in that he says:
>
> 'The states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks.'
>
> * * * * *

> If we put in this language, [of Section 9(b)] which is practically taken from that Supreme Court decision, as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that *we have not infringed any of the rights of the States in that respect, or any of their rules of property,* and we are trying in this bill above everything else to overcome a divided authority and pass a bill that will make it possible to get development. We are earnestly trying not to infringe the rights of the States." 56 Cong. Rec. 9810 (1918). (Emphasis added)

Little need be said regarding Petitioner's frivolous statement that Representative La Follette's remarks refer to property rights in fast lands and have no bearing on interests in "raw water" (Br. 46). Even a casual reading of the remarks themselves—not quoted in Petitioner's brief—reveals specific mention of property rights to diversions of water.

D. Authorities construing the Act.

This Court has expressly held that the Act was not intended to interfere with the validity of water power rights existing under the law of New York and that a licensee of the Commission may not impair such rights without paying compensation therefor. *Ford & Son, Inc.* v. *Little Falls Fibre Company,* 280 U. S. 369 (1930). In that case the defendant, in the construction of a hydroelectric project licensed under the Federal Water Power Act, installed flashboards on the top of a dam owned and maintained by the United States in the Hudson River, thereby raising the water level at the plaintiffs' plant upstream on the navigable Mohawk River and reducing the head of water formerly available to furnish power for their mills. The plaintiffs sought an injunction to restrain

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this interference with their riparian right, under the law of New York, to use the natural flow of the river for power purposes. The defendant argued that any such right was "subordinate to the power of the national government exerted by the Commission through its licensee, whose action so far as it affects respondents' water power is *damnum absque injuria*" (p. 376)—citing the *Chandler-Dunbar* case, the Commission's chief reliance in the case at bar.

The Court answered (p. 377):

> "* * * even though the rights which the respondents here assert be deemed subordinate to the power of the national government to control navigation, the present legislation [the Federal Water Power Act] does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation."

This Court referred to Sections 10(c) and 27 of the Act as support for this conclusion, and continued (pp. 378-9):

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws and so is one expressly saved by §27 from destruction or appropriation by licensees without compensation, * * *."

This, then, is a clear holding that proprietary rights to use the waters of a navigable stream for power purposes, existing under the laws of New York, were not destroyed by the Act. The case also illuminates the fundamental errors of the Commission in concluding that there can be no private property rights to the use of waters of a navigable stream, and in claiming that a license confers on a licensee the absolute right to use such waters regardless of the property rights of others therein. Respondent had no power to acquire the rights of either the Paper Company or of the Pettebone-Cataract companies without compensating the owners therefor. The Commission's disregard of such compensation in the computation of Respondent's amortization reserve is therefore arbitrary and capricious and not in accordance with law.

Petitioner attempts to undermine the *Ford* case as involving "very unusual circumstances" (Br. 45)—without explanation of any unusual features whatever. And the opinion itself also disposes of Petitioner's strained argument (Br. 61) that even though private water rights may exist as between private parties they cannot exist as between the Commission and its licensee. For this Court clearly held in that case that "* * * the powers conferred by [the Act] on the Commission do not extend to the impairment of the operation of [state laws] or to the extinguishment of rights acquired under them * * *" (p. 378). Indeed, in the only case relied upon by Petitioner in support of this argument (*Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586 (1950)), this Court expressly assumed the validity of the action of the regulatory agency—the very point at issue here.

Nor will it do to suggest (Br. 45) that the *Ford* case was overruled by the *Appalachian Power* case, for in a still later case this Court has applied the doctrine of the *Ford* case with direct citation. *United States* v. *Gerlach*

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Live Stock Co., 339 U. S. 725 (1950). There a dam constructed by the United States had impounded the waters of a navigable river. Downstream riparian owners claimed compensation from the United States for the taking of their riparian right under California law to the natural flow of the river. This Court rejected an argument by the United States that the project had been constructed pursuant to its power to improve navigation and that, therefore, under the doctrine of the *Chandler-Dunbar* case, it did not have to compensate riparian owners for injury to their rights existing under State law. The Court held that Congress had intended the project to be constructed under the reclamation law, stating (p. 734):

> "We cannot disagree with claimant's contention that in undertaking these Friant projects and implementing the work as carried forward by the Reclamation Bureau, Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws. [Citations] In this respect, Congress' action parallels that in *Ford & Son* v. *Little Falls Fibre Co.*, 280 U. S. 369."

Again, in a case involving claims against the Government arising out of the same project, it was held that water rights having valid existence under State law must be recognized, the Court observing:

> "Moreover, as pointed out in *Ford & Son* v. *Little Falls Fibre Co., supra*, the Federal Water Power Act contained a provision which required recognition of such private rights, * * *." *Rank* v. *Krug*, 90 F. Supp. 773, 793 (S.D. Cal. 1950).

And in *United States* v. *Central Stockholders Corp.*, 52 F. 2d 322 (9th Cir. 1931), the Court held that a licensee under the Act, who had constructed a dam on a navigable stream, must pay compensation to a lower riparian owner for damages to the latter's right under California law to the natural flow of the river (p. 332):

> "To put it in another way, the law [Act] expressly recognizes all private rights established and determined by the law of the state and expressly requires the permittee, where it interferes with such rights to compensate the owners therefor."

That water rights have value under the Act was recognized in *Alabama Power Company* v. *McNinch*, 94 F. 2d 601 (D. C. Cir. 1937). There, the plaintiff contended that the Federal Power Commission had erred in not including in the original cost of the project the value of a water right acquired from another company. The court agreed, holding that the plaintiff's upstream dam was erected "in derogation of the water right" of the other company (p. 616) and that the acquisition of that right was necessary to the successful completion of the plaintiff's project.

Moreover, this Court has recently reaffirmed that the Act did not destroy proprietary rights existing under State law to use riparian land for power site purposes. *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359 (1948). In 1935, the Oklahoma Legislature created the Grand River Dam Authority and granted to it exclusive authority to develop the water power of the Grand River. The Authority applied for and was granted a license by the Federal Power Commission. The Authority instituted condemnation proceedings in the Oklahoma courts, under a right of condemnation granted by that State, to procure a power site on the Grand River owned by Grand-Hydro. The major issue in that litiga-

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tion was whether the amount to be paid Grand-Hydro for this taking should include the value of Grand-Hydro's right, under Oklahoma law, to use the land for power site purposes. This Court held that it should, stating (p. 372):

> "It is clear that the Federal Power Act cannot be said to have so far affected the use of this land for a power site as to destroy or otherwise render valueless the owner's right to use it for that purpose. That Act merely has attached conditions to the use of the land for a power site. The Act seeks to encourage rather than to prohibit the development of power sites. It seeks to preserve or enhance, not to destroy, their value as such. While the Act has limited the time and manner of the use of this particular land for a power site, the Act has left great benefits available to the owner from such a use of the land."

First Iowa Coop. v. *Federal Power Commission*, 328 U. S. 152 (1946), relied on so heavily by Petitioner, does not hold that private rights to use water were abolished by the Act. First Iowa had applied to the Commission for a license to construct a hydroelectric project involving the diversion of water from one river to another. The Commission rendered an opinion approving the plans but, before the license could be granted, it was confronted with a claim by the State of Iowa that under Section 9(b) of the Act, First Iowa, in order to obtain a Federal license, had to show that it had complied with statutes of Iowa requiring a state permit approving the plans for the project. In fact, such approval could not have been given since the plans involved a violation of a statute of Iowa requiring that water taken from a stream in connection with a power project be returned thereto at the nearest practicable place. The Commission denied the application on the ground that First Iowa had not shown satisfactory evidence of such compliance.

This Court reversed, holding that to require compliance with such state regulatory statutes would be to vest in the state a veto power over the project and would thus "subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission * * *." (p. 164). It held that Congress intended that the Commission, not the states, should be the final arbiter in matters relating to the form that a power project should take in order to make the most efficient use of the water power available and that conflicting state laws necessarily yielded. But at the same time the Court made it clear that this authority of the Commission did not extend to such purely local matters as proprietary rights in navigable waters. After quoting the last paragraph of Representative La Follette's statements (pp. 27-30 above), the Court stated (p. 174):

> "As indicated by Representative La Follette, Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power and also with the recognition of *the constitutional rights of the States* so as to sustain the validity of the Act. The resulting integration of the respective jurisdictions of the State and Federal Governments is illustrated by the careful preservation of the separate interests of the States throughout the Act, without setting up a divided authority over any one subject." (Emphasis added)

And the Court further observed (p. 178):

> "When this application has been remanded to the Commission, that Commission will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of *the legal title of the applicant to its riparian rights,* or as to the validity of its local franchises, if any, relating to proposed intrastate public utility service.

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Section 9(b) says that the Commission may wish to have 'satisfactory evidence' of the progress made by the applicant toward meeting local requirements but it does not say that the Commission is to assume responsibility for the legal sufficiency of the steps taken. The references made in §9(b) to *beds and banks of streams, to proprietary rights to divert or use water*, or to legal rights to engage locally in the business of developing, transmitting and distributing power neither add anything to nor detract anything from the force of the local laws, if any, on those subjects. In so far as those laws have not been superseded by the Federal Power Act, they remain as applicable and effective as they were before its passage." (Emphasis added)

In short, a conflicting state regulatory statute must yield to the judgment of the Commission as to the most efficient form that a power development is to take. That principle is wholly consistent with the intent of the Act to create a central planning agency for power development. Equally clearly the Act was not intended to derogate from the validity of the proprietary rights of riparian owners existing under the laws of the several states.

E. The Act was not intended to be confiscatory.

The fact is that enactment of the Federal Water Power Act was, as we have shown, intended to encourage water power development by providing a long-term irrevocable Federal permit, and there was no intention of destroying water rights validly existing under State law. As enacted, the Act did not even contain a provision prohibiting structures in navigable waters for the development of power. Such a provision was not included in the Act until the

addition of the first sentence of Section 23(b) in 1935.[11] During the intervening years it would appear that only the provisions of the International Boundary Waters Treaty and the Rivers and Harbors Act of 1899 sought to control diversions of water from the Niagara for the creation of power. The parties to the Treaty clearly had no intention of destroying water rights. As for the Rivers and Harbors Act, the case of *Pike Rapids Power Co.* v. *Minneapolis, St. P. & S.S.M.R. Co.*, 99 F. 2d 902 (8th Cir. 1938), *cert. denied*, 305 U. S. 660 (1939), 306 U. S. 640 (1939), *rehearing denied*, 306 U. S. 667 (1939), held that rights of riparian owners were not thereby abolished. One of the basic issues in that case was whether the placing of piers in the river bed to support a bridge, which the defendant had been authorized to construct by Act of Congress, constituted a trespass. The plaintiff power company argued that, under the law of Minnesota, it as riparian owner had a vested right to make every possible private beneficial use of the bed of the river including the building of dams, and therefore that it was entitled to damages for defendant's interference with its rights caused by the placing of the bridge piers on the bed of the river in front of its upland. The defendant railroad company replied (99 F. 2d at 908):

> "The common law riparian right to build a dam has been completely abolished by the Rivers and Harbors Act of March 3, 1899 * * *."

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[11] Petitioner's assertion (Br. 32) that "Sec. 4(d) (now Sec. 4(e)) * * * prohibits by implication all those acts for which license will be granted" is in marked contrast with the testimony of its counsel in 1947 before a Subcommittee of the Committee on Interstate and Foreign Commerce that "prior to 1935 the Federal Water Power Act contained no prohibition against construction, operation, or maintenance of a single power project at any place in the United States, * * *" Hearings on H.R. 2972 and H.R. 2973, 80th Cong., 1st Sess., 379-380.

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The Court rejected this contention, holding (pp. 908-9):

> "It will be observed that the riparian right to build a dam is not absolutely abolished by this statute; the right is suspended only until the consent of Congress is obtained and the plans have been approved by the designated officers. The statute merely regulates the use of the right; it does not abolish it. * * *"

Indeed, the holding of *Pike Rapids* is equally applicable to §23(b) of the Federal Power Act which as we have said was added in 1935 and which provides in pertinent part as follows:

> "(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States * * * except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act."

This is a far cry from the Commission's sweeping assertion that the Act and its predecessor statutes—presumably referring to the Rivers and Harbors Act—demolished all common law riparian rights (Br. 11). The correct view is, of course, that the proprietary right to use waters of a navigable river for the creation of power is not destroyed by requiring that a license be obtained for the construction or operation of works incidental thereto. Nor does the fact that consent is required convert the Federal Government into the source of the right to construct such works. *International Bridge Co.* v. *New York,* 254 U. S. 126, 133 (1920).

Analogous situations pinpoint Petitioner's error in concluding that the Act has destroyed all private rights to use water for power and converted the Federal Government into the source and fountainhead of such rights. An owner of real estate may be restricted in its use by zoning ordinances, or may not use it for certain purposes —such as selling liquor—unless the necessary permit is obtained. Under Petitioner's view, where the necessary variance or permit had been obtained by the lessee of such property rather than by the owner, the latter's proprietary rights would vanish and he would be precluded from collecting any rental. Again, one may own a motor vehicle and yet not have the right to use it to haul passengers or freight for hire in interstate commerce until the requisite permission has been obtained from the proper authorities; but Petitioner's reasoning would deny the ownership until the permit had been secured. To carry the analogy a step closer to the case at bar: If the owner leases his vehicle to another who then obtains the necessary permit, under Petitioner's reasoning the operator could thereupon refuse to make further payments to the owner. A similar result would presumably be reached where real estate is leased to a railroad company for use in an interstate transportation system. Absurd though all this sounds, it is the result dictated by the Petitioner's erroneous reasoning.

The correct view, of course, is that although an owner of property may not have the right to use it for certain purposes without a permit from the proper authorities, that fact does not abolish his ownership or enable others with a permit to use his property for those purposes free of charge. Nor does it make his property any less the proper subject of bargain and sale.

The soundness of that principle is illustrated by *Cleveland Electric Railway Company* v. *Cleveland*, 204 U. S.

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116 (1907). There the municipality had granted to plaintiff a franchise to lay down a track in the street, and to use the same for transportation purposes. The franchise was not renewed upon its expiration, but the municipality granted to another the right to maintain and operate the existing street railroad. Plaintiff sued the municipality and the new grantee, claiming *inter alia* that the new grant unconstitutionally deprived plaintiff of its property. Admittedly plaintiff had no right to use the tracks, its franchise having terminated, and in fact the tracks had little use other than for transportation purposes. Yet this Court sustained plaintiff's claim, holding that the franchise to operate the street railroad did not carry with it the authority to appropriate plaintiff's proprietary rights in the rails, which rights remained valid even though plaintiff could not use the rails without its franchise.

That principle has also been repeatedly recognized by this Court in cases involving the Interstate Commerce Act. Those cases are particularly apposite here, in view of this Court's holding that the aim of Congress in creating the Federal Power Commission was to set up a body with functions and powers comparable to those of the Interstate Commerce Commission. *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U. S. 153, 168 (1953). That the Interstate Commerce Act and state regulatory laws do not operate to divest carriers of their proprietary rights—any more then the Federal Power Act effects a divestiture of private rights—has long been recognized by this Court:

> "This court has repeatedly had occasion to say that the railroads, though their property be dedicated to the public use, remain the private property of their owners, and that their assets may not be taken without just compensation. The carriers have not

> ceased to be privately operated and privately owned, however much subject to regulation in the interest of interstate commerce. There is no warrant for taking the property or money of one and transferring it to another without compensation * * *" *Railroad Retirement Board* v. *Alton R.R.*, 295 U. S. 330, 357 (1935)

The breadth of Petitioner's contentions leads it to assert that the continued existence of private water power rights is "completely inconsistent" with the comprehensive powers of control delegated to the Federal Power Commission (Br. 14, 43). This enunciates a principle repeatedly rejected by this Court—for there is no incompatibility between the private right of ownership and the public power of reasonable regulation; they co-exist and do not one destroy the other. *Missouri-Pacific Ry.* v. *State of Kansas*, 216 U. S. 262, 275 (1910); *Atlantic Coast Line* v. *North Carolina Corporation Commission*, 206 U. S. 1, 20 (1907).[12]

F. The Chandler-Dunbar and New River cases.

In supposed support of its erroneous interpretation of the Act as confiscatory, Petitioner urges certain language used by this Court in *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53 (1913) and repeated in

[12] The doctrine that the power to regulate is not the power to confiscate property is exemplified by the following additional decisions:

As to railroads, *Mississippi Railroad Commission* v. *Mobile & Ohio R.R.*, 244 U. S. 388 (1917); *Hartford Fire Insurance Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 175 U. S. 91, 99 (1899);

As to navigable airspace, under the Air Commerce Act of 1926, 44 Stat. 568, *as amended*, 49 U.S.C. §171, *et seq.* (1946), and the Civil Aeronautics Act of 1938, 52 Stat. 973, *as amended*, 49 U.S.C. §401 *et seq.* (1946); *United States* v. *Causby*, 328 U. S. 256 (1946); *Roosevelt Field, Inc.* v. *Town of North Hempstead*, 88 F. Supp. 177 (E.D.N.Y. 1950).

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nited States v. *Appalachian Power Co.*, 311 U. S. 377 1940) to the effect that the flow of a navigable stream in no sense private property (Br. 22). And its efforts find support for its extreme views reach new heights hen it asserts that this "very problem"—whether the Act estroyed all private water rights—was presented to this ourt in the *Chandler-Dunbar* case (Br. 33). Here indeed a monumental inversion of the slogan *nunc pro tunc*, or the Act was passed in 1920 and the *Chandler-Dunbar* ase was decided in 1913. Moreover, as Petitioner's argument as to the *Chandler-Dunbar* case admits (Br. 33-38), here Congress had expressly enacted that ownership fee by the United States of certain lands on a designated river was necessary for the purposes of navigation -a totally different concept from that underlying the tatute setting up the Federal Power Commission as a egulatory body. In view of this fundamental difference f purpose, what possible weight can there be in Petioner's wholly unsupported assumption that such difference is immaterial? (Br. 13).

Chandler-Dunbar involved a statute which declared (Act f March 3, 1909, 35 Stat. 815, 820):

> "That the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present St. Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith."

n accordance with that Act, the Secretary of War conemned those lands and property consisting in part of the ank and bed of the St. Marys River which were owned

by the Chandler-Dunbar Company. This Court noted the principal question before it to be (p. 60):

> "* * * whether the Chandler-Dunbar Company has any private property in the water power capacity of the rapids and falls of the St. Marys River which has been 'taken,' and for which compensation must be made under the Fifth Amendment * * *."

The Chandler-Dunbar Company did not deny that its rights to the water power of the river were subject to a non-compensable taking by the United States in the proper exercise of its dominant power to improve navigable waters, but claimed that this power of the United States did not extend to such a taking of rights of riparian owners to use the water power of the river so long as all possible requirements of navigation were not interfered with. Observed the Court (p. 61):

> "This claim of a proprietary right in the bed of the river and in the flow of the stream over that bed to the extent that such flow is in excess of the wants of navigation constitutes the ground upon which the company asserts that a necessary effect of the act of March 3, 1909, and of the judgment of condemnation in the court below, is a taking from it of a property right or interest of great value, for which, under the Fifth Amendment, compensation must be made."

and it continued (p. 62):

> "This title of the owner of fast land upon the shore of a navigable river to the bed of the river, is at best a qualified one. * * * It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the

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> exercise of the great and absolute power of Congress over the improvement of navigable rivers. * * * If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation."

This Court concluded as follows (p. 65):

> "The conclusion to be drawn is, that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river by riparian owners, and whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character; and when Congress determined, as it did by the act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was 'necessary for the purposes of navigation of said waters and the waters connected therewith,' that determination was conclusive."

At most then, this Court held that the rights of an owner of the bank and bed of a navigable river to use the bed and flow of that river for the production of power are subordinate to the dominant power of the United States to improve navigable waters and that therefore the extinction of those rights in the course of an actual navigation improvement by the United States is not a "taking" of private property within the meaning of the Fifth Amendment.

Subsequent cases involving takings of a riparian owner's property by the United States acting in the exercise of its

power to improve navigable waters are in accord with *Chandler-Dunbar. United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592 (1941); *United States* v. *Commodore Park, Inc.*, 324 U. S. 386 (1945); *United States* v. *Willow River Power Co.*, 324 U. S. 499 (1945). The rationale of these cases was stated in *United States* v. *Kansas City Life Insurance Co.*, 339 U. S. 799 (1950), involving a claim against the Government for damages caused to private land by the construction of a Government dam. This Court said (p. 808):

> "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. See Gould on Waters, c. IV, §§86-90 (1883); I Farnham, Waters and Water Rights, c. III, §29 (1904). This has applied to the stream and to the land submerged by the stream. There thus has been ample notice over the years that such property is subject to a dominant public interest. This right of the public has crystallized in terms of a servitude over the bed of the stream."

These cases stand for the proposition that the destruction of riparian rights by the United States acting in the exercise of that servitude is not a "taking" of private property within the meaning of the Fifth Amendment since such rights are and have, since ratification of the Constitution, always been subordinate to that servitude. It was in this context that this Court in *Chandler-Dunbar* remarked that "the flow of the stream was in no sense

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private property" and "that the running water in a great navigable stream is capable of private ownership is inconceivable." (229 U. S. at 66, 69).

That language was repeated in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424, 427 (1940). There, the United States sought to enjoin the construction of a dam by the power company except under license from the Federal Power Commission. The power company argued that certain provisions of the license offered it were unconstitutional. In particular, it argued that, as a riparian owner with, as the Court noted, as complete a right to the use of the riparian lands, the water, and the river bed as could be obtained under State law, it could not be compelled to submit to the acquisition clause in the license with a price fixed at less than a fair value in the eminent domain sense. Under Section 14 of the Act and the acquisition clause, the United States may take over a licensed project at the expiration of the license upon payment of the net investment (not to exceed the fair value); and the statute provides that the values allowed for water rights included in such net investment shall not be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee. Said the Court (at pp. 427-8):

> "It is now a question whether the Government in taking over the property may do so at less than a fair value. It has been shown, note 77, *supra*, [citing *Chandler-Dunbar*] that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power. We assume without deciding that by compulsion of the method of acquisition provided in §14 of the Power Act and the tendered license, these riparian rights may pass to the United States for less than their value. In

> our view this 'is the price which [respondents] must pay to secure the right to maintain their dam.' "

We do not argue here with the proposition that if the Government itself were to build the dam in the exercise of its power to improve navigable waters it would have to pay nothing for the water power. That question is not at issue here. We do quarrel with Petitioner's conclusion that passage of the Act has made water rights valueless (Br. 13, 24). Section 14 provides that the actual reasonable cost (not to exceed the fair value) of water rights shall be included. And this Court did not proclaim, as Petitioner would like to believe, that such rights do not exist or have been destroyed. To the contrary, it said, "We assume without deciding that * * * these riparian rights may pass to the United States for less than their value." We find no warrant here for a conclusion that riparian rights do not exist or have no value. To the contrary, the conclusion to be drawn is that the actual reasonable cost thereof rather than the then fair value shall be included in the net investment to be paid the licensee by the United States.

Moreover, the Federal Power Act did not constitute an exercise by the United States of its servitude over navigable waters. One can find in it no declaration that all the waters of all of the navigable rivers of the United States are necessary for purposes of navigation as was the case in *Chandler-Dunbar*. Surely some such provision would have been included had the Act been intended to constitute a taking as was the statute in *Chandler-Dunbar*.[13]

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[13] In fact, Congress knew of the *Chandler-Dunbar* situation at the time of its debates and hearings on the Water Power bill and the bill's managers were at pains to assure their colleagues that it was not intended to accomplish a specific taking as was the statute in *Chandler-Dunbar*, 59 Cong. Rec. 1040 (1920); 59 Cong. Rec. 1431 (1920); *Hearings of the House Committee on Water Power*, 65th Cong., 2d Sess. 879 (1918).

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G. Section 27.

Nevertheless, Petitioner's misconception of the Act as confiscatory leads Petitioner to view Section 27 as the lone provision in the Act preserving private water rights —as a saving clause rescuing only a limited category of those rights from the wholesale destruction supposedly perfected by Sections 1-26 (Br. 43-8). Section 27 states:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Petitioner asserts that there is nothing in the Act which preserves private water power rights (Br. 14, 43-8), that unless those rights were expressly saved by the Act they were abolished (Br. 14), and that the Act is "expressly designed to prevent the preservation by way of implication" of those rights (Br. 46-7). Few statements more sharply illuminate the fundamental fallacy of the Commission's argument, which essentially rests on the mistaken notion that one must assume that a regulatory statute wipes out private rights unless the Act in express terms preserves them. This is an unbridled reach of the Federal arm, apparently resting on destruction by implication. The correct view is precisely the contrary; no such destruction by silence will be assumed, nor will such a drastic step be imputed to Congress in the absence of a clear and unequivocal intention expressed in the Act and its legislative history.

Nevertheless, on the basis of certain language in this Court's opinion in *First Iowa*, Petitioner asserts that the words "other uses" in Section 27 must be confined to rights

of the same nature as those relating to the use of water in irrigation or for municipal purposes (Br. 44-6). As we have shown above (pp. 35-7), *First Iowa* merely held that when a State law as to the form of a power development conflicts with the Act, State law must yield to Federal; and it was only in this context—the clash of State and Federal regulation—that the Court had occasion to consider Section 27. *First Iowa* presented no issue as to the effect of the Act on the existence of property rights to use water; indeed, this Court recognized that the regulatory nature of the Act still left to the States their constitutional jurisdiction over such questions as the sufficiency of the legal title of an applicant to its property rights. 328 U. S. at 174, 178.

The tortured construction which Petitioner now places on the Act—that Section 27 was intended as a narrow saving clause tacked on to a statute that in one broad sweep abolished proprietary water rights country-wide—was never decided in *First Iowa*. Nor was there presented to this Court any legislative history in support of this broad contention. None was relevant; and indeed none could have been mustered to support Petitioner's view, for Congressional history reveals precisely the contrary and demonstrates that Section 27 was intended as a recognition of existing water rights.

Thus, during the Congressional hearings, Representative Mondell remarked as follows:

> "This act should contain * * * some such provision as this: 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water'. * * * That is simply a statement of facts. It is not a new law. It is simply a recognition of the situation as a guide to administrative

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officers who sometimes forget very basic and fundamental things." *Hearings before the House Committee on Water Power,* 65th Cong., 2nd Sess., 619-20 (1918).

After Section 27 was added to the bill, Representative Mondell remarked:

"I am glad the provision the gentleman [Representative Taylor] urged, and which I also urged in my hearing before the committee, is in the bill. It is highly important, and yet the gentleman knows that it is simply a declaration of fact; it is simply the recognition of a fact; but it is important to have it in the bill." 56 Cong. Rec. 9115 (1918).

And Representative Taylor, the member of the House Committee on Water Power primarily responsible for the addition of Section 27 of the Act (56 Cong. Rec. 9115 (1918)), commented:

"That section [Section 27] not only recognizes and protects our plain constitutional vested water rights, but it is fair and honest, * * *." 56 Cong. Rec. 9912 (1918).

And later:

"This special water-power committee feel that where people now have legally recognized rights of various kinds, we did not want to rip them up.

* * * * *

That is one of the things that all of the western Members have earnestly and jealously guarded against—not to legislate a man out of his existing rights, either in agricultural claims or water rights or coal or oil * * *." 56 Cong. Rec. 10033-4 (1918).

These quotations plainly show that Congress had no intention of wiping out private water rights. Indeed, diligent research into the extensive legislative discussion of the bill has failed to unearth evidence that Congress in any way intended the Act as a confiscatory measure designed to abolish with one sweep private water rights throughout the country. Had such a purpose existed, would there not have been full debate of this issue in Congress and extensive hearings in Committee? Petitioner's construction of the Act cannot be established by innuendo, especially "in view of the dearth of legislative discussion of the matter." *United States* v. *The Public Utilities Commission of California,* 345 U. S. 295, 310 (1953).

Congressional history also reveals that Section 27 was drawn from Section 8 of the Reclamation Act, 32 Stat. 390 (1902). Representative Taylor stated that it "is copied from the reclamation act * * *." 56 Cong. Rec. 9115 (1918). This is readily apparent from a comparison of the two sections:

Section 8, Reclamation Act	*Section 27, Federal Power Act*
"SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water *used in irrigation,* or any vested right acquired thereunder, * * *." (Emphasis supplied.)	"SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water *used in irrigation or for municipal or other uses,* or any vested right acquired therein." (Emphasis supplied.)

It is obvious that the legislators in copying Section 27 from the Reclamation Act increased the scope of the

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language by adding "or for municipal or other uses." Had the intent been to limit Section 27 to merely irrigation or municipal uses, there would have been no need to add the reference to "other uses". The quoted words must therefore be read not as referring only to uses of the same nature as irrigation and municipal, but rather must have a broader meaning—viz., uses other than those previously specified. For when a general word is subsequently added to a specific enumeration, this Court has rejected attempts to apply the doctrine of *ejusdem generis* since the intent of the legislature must have been to broaden the scope of the specific enumeration; to hold otherwise, as Petitioner urges, would be to impute to the legislature the doing of a meaningless act. *Gooch v. United States*, 297 U. S. 124, 126-8 (1936); *United States v. Mescall*, 215 U. S. 26, 32 (1909).

The relationship between Section 8 of the Reclamation Act and Section 27 of the Federal Power Act assumes particular significance in view of this Court's observation in the *Gerlach* case (p. 33 above) that Congress' action there under the Reclamation Act parallels its action under the Federal Power Act in the *Ford* case. It will be recalled that in the *Ford* case (p. 31 above) this Court pointed to Section 27 as one of the provisions of the Act demonstrating that Congress did not intend that a licensee under the Federal Power Act could destroy without compensation private water rights of others; and in the *Gerlach* case a similar holding was made with respect to private rights in view of Section 8 of the Reclamation Act. Read together, both cases stand for the proposition that private rights are not destroyed by either statute.

It follows that Petitioner is in error in arbitrarily applying the doctrine of *ejusdem generis* to Section 27 and so subverting the Congressional intent. That so-called doctrine is no more than a canon of construc-

tion to be resorted to in the absence of other evidence as to the meaning intended. Particularly, it should never be invoked to subvert the intention of the legislature. *United States* v. *Alpers*, 338 U. S. 680, 682 (1950); *Texas* v. *United States*, 292 U. S. 522, 534 (1934); *Mason* v. *United States*, 260 U. S. 545, 554 (1923); *Danciger* v. *Cooley*, 248 U. S. 319, 326 (1919).

H. The Niagara Falls cost case.

Petitioner seeks to draw some comfort from *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787 (2d Cir. 1943), *cert. denied*, 320 U. S. 792 (1943), *rehearing denied*, 320 U. S. 815 (1943). That case involved Section 23(a) of the Act providing in pertinent part:

> "* * * The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, * * *: Provided, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects * * * shall * * * be deemed to be the amount to be allowed as the net investment of the applicant * * *."

Respondent had obtained a "fair value" license under Section 23(a) from the Commission in 1921. Later the Commission reversed its position and in 1942 issued an order requiring that Respondent reduce the capitalization of its Project No. 16 to the actual legitimate original cost thereof. Respondent's appeal from this order called upon the Court to determine the scope of Section 23(a).

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The Court decided that Section 23(a), in providing for a fair value license for projects operated under a permit existing at the date the Federal Water Power Act became effective, applied only to projects then operating under continuing Federal permits. The Court held that the Power Company had no such permit, because the permit issued under the Congressional Joint Resolution of July 12, 1919 (R. 468-70) had by its terms expired on the enactment of the Federal Water Power Act and therefore, when the license was issued on March 2, 1921, Respondent had no then existing prior Federal permit for diversion. Hence the Court decided that Respondent was not entitled to a fair value license.

Further definition of the issue involved in the *Niagara Falls* case may be found in the opinion of the Commission rendered in that proceeding:

> "The question presented for our determination is whether the Niagara Falls Power Company, when it applied for a license on July 3, 1920, possessed a valid existing Federal permit, right-of-way, or authority under which it could at its option have continued to operate this project without obtaining such license." *In the Matter of The Niagara Falls Power Company, Licensee,* 3 FPC 206, 212 (1942).

And the Commission pointed out:

> "* * * it is clear that licensee could not qualify for a Section 23 license by reason of any alleged rights it had acquired under state law. It is not necessary therefore to pass upon the validity of such rights." (3 FPC 211-12)

It is thus plain that whether Respondent was entitled to a "fair value" license under Section 23 depended wholly upon whether it held a Federal permit continu-

ing beyond the date the Act was approved, and not upon the validity of its rights under New York law to use the waters of the Niagara River. Any consideration of the validity of those rights by the Court of Appeals for the Second Circuit, therefore, was wholly unnecessary.

Petitioner's reliance upon the remarks of Judge Learned Hand in this case (Br. 25, 30, 42, 59) and upon those of Senator Wadsworth (Br. 41-2, 47, 49, 57) is obviously misplaced. Their remarks were directed to the issue whether Respondent's rights under New York law should be considered as a "permit or valid existing right of way" within the meaning of Section 23 under which Respondent could at its option have continued to operate its project without obtaining a license,—and hence escape any Federal regulation whatever. To assert that a property owner is subject to Federal regulation is a far cry indeed from Petitioner's conclusion that his property is wholly destroyed.

Indeed, none of Petitioner's strained efforts casts any doubt upon the correctness of the holding of the Court below, which interpreted the Act as an instrument of control, not of confiscation. The Court went to the heart of the matter when it referred to the Commission's misconception of the Act, a misconception repeated in Petitioner's brief. Said the Court (R. 607):

> "Much of the difficulty in this case has arisen from what we regard as a misconception of the Water Power Act and of the nature of licenses issued thereunder. The Act is purely a regulatory measure. A federal license is not an original grant of authority, but a permission to use a state's grant of authority. To be sure, a license is a prerequisite in that water rights under state law in a navigable stream may not be exercised without one, as the Supreme Court held in the *New River* case. And when state law or regulation

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conflicts with the Act, or with any lawful federal regulatory action, or with lawful terms of a federal license, state authority must yield to federal, as the Supreme Court held in the *First Iowa* case. But these considerations do not by any means require the conclusion that the Act and a license thereunder constitute the source from which all water rights flow."

III

Petitioner's assertion that the rights before this Court are "highly attenuated" (Br. 49) and therefore were wiped out by the Act is based on erroneous premises of fact and law.

Faced with a dearth of authority in support of its assertion that the Act was intended to be confiscatory, Petitioner argues that Congress must have intended to wipe out the water rights here in question because of "the circumstances under which [they] were created" (Br. 48), because Congress could not have intended to countenance "dealings in water power rights of the kind involved in the instant case" (Br. 54), and because the rights are "highly attenuated" (Br. 49) and "tenuous, almost transcendental" (Br. 19). Besides being a most novel way of showing the intention of Congress, this argument is based upon erroneous premises of fact and law.

A. Transactions relating to the creation of these rights.

Petitioner asserts that the Pettebone-Cataract and International Paper Company rights are derived not from common law riparian rights but solely from grants made by the State of New York (Br. 51, 57 n. 48) which grants Petitioner implies were unconstitutional (Br. 51 n. 42). We have been at pains to show that Respondent and its predecessors in title owned riparian land on the Niagara

River (pp. 3-4, 17-9); that under New York law the right of such a riparian owner to use water of the stream for power purposes is a corporeal hereditament and real property, and that the rights of Respondent's predecessor in title have been so characterized by the courts of New York (pp. 15-6); that under New York law such a corporeal hereditament may be severed from the land and conveyed in whole or in part, as was done in the instant case (p. 17); and that the Pettebone-Cataract and International Paper Company rights have been recognized, respectively, by the courts of New York and by this Court (pp. 17-8). We find no warrant here for Petitioner's misguided assertion that the rights at bar are derived solely from State grants. Moreover, *Matter of Long Sault Development Co.*, 212 N. Y. 1 (1914), *error dismissed*, 242 U. S. 272 (1916), the only case cited by Petitioner in support of its implication that the statutory grants defining and confirming Respondent's riparian rights were unconstitutional, has no bearing here. That case—which in no way involved Respondent—held that an act of the State of New York granting to a private corporation virtually entire control over navigation of a substantial section of the St. Lawrence River was unconstitutional. In contrast, the statutes confirming the rights of Respondent's predecessors to divert limited amounts of water from Niagara River do not in any way constitute an abdication by the State of New York of its sovereign powers. (N. Y. L. 1892, c. 513, R. 403; N. Y. L. 1896, c. 968, R. 405).

Furthermore, there has been nothing collusive or secretive about the transactions relating to these rights despite Petitioner's implications to the contrary—here asserted for the first time in the course of this prolonged controversy. (Br. 54, 55). There has never been any affiliation between Respondent and International Paper Company and as long

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ago as 1906 the diversion by the Paper Company was explicitly set forth in The Niagara Falls Power Company's application for a permit under the Burton Act (R. 422, 424). A contemporaneous report, transmitted by the American members of the International Waterways Commission to the Secretary of War, described in detail the diversion by the Paper Company (R. 430-1). The permit was thereafter issued by the Secretary of War and was renewed from time to time during the life of the Burton Act (R. 436, 452, 454); the permit in terms states that the power stations of the Power Company "and of its customers" (referring to the Paper Company, among others) shall be open to inspection by the Federal authorities at all times. After the expiration of the Burton Act, the diversions continued with the knowledge and consent of the Federal authorities. There can be no argument on this score, for shortly after the expiration of that Act, the War Department wrote the Power Company that it had no objection to the continuance of existing diversions (R. 455); and in 1917 and thereafter, pursuant to Congressional Joint Resolutions (R. 457, 461, 465, 468), the Secretary of War issued permits to the Power Company authorizing additional diversions from the Niagara River which again provided that the power stations of the Power Company and of its customers should be open to inspection by the Federal authorities at all times (R. 459, 466, 469). Finally, the Commission itself has been well aware of the existence of the Paper Company rights since its formation, for the Project No. 16 License which was issued March 2, 1921 pursuant to the Federal Water Power Act, stated in part:

> "Such taking over of the project shall also be subject to the rights, if any, of Pettebone-Cataract Paper Company and Cataract City Milling Company

to withdraw water at a rate not exceeding 265 cubic feet per second from the Hydraulic canal or basin of licensee, and to the rights, if any, of International Paper Company." (R. 384)

The existence of the Pettebone-Cataract rights has also been frequently disclosed to the Federal authorities from the very commencement of Federal regulation of diversion of waters from the Niagara River (R. 336-52, 355-6, 371); and Federal permits have authorized and provided for diversions in amounts sufficient to include such rights (R. 357-9, 365, 367). Indeed, the Power Company's 1921 application for a license under the Federal Water Power Act described in some detail proposed construction necessary to utilize the outfall of the turbines of the Pettebone-Cataract Companies; those diversions were described in hearings on the application before the Commission; and after issuance of the license, the proposed construction was completed (R. 337-52). Neither is there any basis here for the Commission's implication that the transactions pursuant to which Respondent acquired the use of the Pettebone-Cataract rights were not at arm's length for, as we have shown, those transactions were submitted to and approved by the New York Public Service Commission (R. 272-80) and that Commission later found that the price paid to the Pettebone-Cataract Companies for those rights was fixed by arm's length bargaining between two non-affiliated companies (R. 297).

B. The rights at bar are not "highly attenuated".

Relying principally upon the case of *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696 (1945), Petitioner asserts that "little but an empty shell has been left of [Respondent's] common law riparian water rights." (Br.

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51). Petitioner's confusion is indicated by its next sentence which states in effect that Respondent has no common riparian water rights. At any rate the *Duryea* case does not stand for the proposition urged by Petitioner.

A brief summary of the New York legislation leading up to the *Duryea* case will pinpoint Petitioner's misinterpretation of its holding. The 1918 Act under which Respondent's predecessor companies were consolidated confirmed that the new company should be entitled to all the rights of its predecessors. As a condition of permitting the consolidation, however, New York reserved the right to charge an "equitable rental" on diversions in excess of 15,100 cfs, the amount of diversion allowed the predecessor companies prior to World War I. N. Y. Laws 1918, c. 597 (R. 407). In the early 1930's Respondent contested the amount of an "equitable rental" imposed pursuant to this reservation on certain diversions then being made in excess of 15,100 cfs. The New York Court of Appeals held that, since Respondent had accepted all the benefits of the Act of 1918 under which it was incorporated, it could not deny its obligation to pay such an "equitable rental" imposed by the State pursuant to a right expressly reserved in that Act; and the court refused to review the amount of the rental fixed by the State Water Power and Control Commission. *Niagara Falls Power Co.* v. *Water Power and Control Commission*, 267 N. Y. 265 (1935), *cert. denied*, 296 U. S. 609 (1935).

In 1937, the New York Water Power and Control Commission instituted an action to enjoin Respondent from diverting the basic 15,100 cfs on the ground that it had not obtained a license to do so allegedly required under the New York Conservation Law. That law then provided in substance that diversion of water from the Niagara River for power or other commercial purposes

was unlawful except under a license from the Water Power and Control Commission or by virtue of a "right lawfully and previously acquired". N. Y. Conservation Law, §634. The Court dismissed the action, referring to the cases cited above (p. 15) holding that a riparian owner's right to divert and use water from a navigable river is a valuable property right and to the New York statutes confirming Respondent's rights of diversion. *Water Power and Control Commission* v. *Niagara Falls Power Co.*, 262 App. Div. 460 (1941), *aff'd*, 289 N. Y. 353 (1942). The Court held that these rights, though subject to the reserve powers of the State, exempted Respondent from the provisions of the Conservation Law as to the basic 15,100 cfs since they constituted rights "lawfully and previously acquired".

In 1943, the Legislature amended the New York Conservation Law by deleting the exception accorded to a "right lawfully and previously acquired" and changing the law to provide in pertinent part that any diversion from the Niagara River for power or other commercial purposes was prohibited unless such diversion was "subject to the charging or imposition of an equitable rental pursuant to the provisions of this article".[14] Section 614 of the Conservation Law, pursuant to which the State Commission had imposed a rental for water diverted in excess of 15,100 cfs, was amended to expressly require that, after July 1, 1943, an equitable rental be charged also on diversions up to 15,100 cfs in an amount to be fixed by that Commission; and a further amendment provided that no state license be required for diversion of waters for which a rental is paid.[15]

Respondent then brought an action to obtain a declaration that the 1943 Act was invalid. The New York

[14] N.Y.L. 1943, c. 46.

[15] Id.

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Supreme Court held that the rights of diversion and use possessed by Respondent were not of such a character as to preclude the State, in the exercise of its inherent sovereign power, from imposing a charge thereon. *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. 696 (1945). It should be noted that Respondent has never been required to obtain a license from the State. Its diversions from the Niagara have never been interfered with and have continued to date. To hold that the exercise of a proprietary right is subject to the imposition of a charge by the State is not to hold that the right itself has been in effect destroyed, as Petitioner attempts to argue from the *Duryea* case (Br. 52-3). That holding was confirmation, not destruction, of Respondent's rights, as the Court below correctly held (R. 598).

In closing, we submit that the Commission's action here under review disregards valid and existing rights and contractual obligations which Respondent is bound to respect unless and until relieved therefrom by a judgment or decree of a court of competent jurisdiction. *Ford & Son, Inc.* v. *Little Falls Fibre Company*, 280 U. S. 369 (1930); *Matter of Aluminum Company of America* v. *Maltbie*, 289 N. Y. 357 (1942).

The Commission cannot justify its action by claiming that under the decision below the United States will have to pay for these water rights upon acquisition, and every year consumers will have to pay for those rights in their rates (Br. 12, 23). The fact is that under the terms of Section 14 of the Act, if Congress later should decide that the United States is to take over a licensed project, the actual reasonable cost (not to exceed fair value) of water rights at the time of acquisition by the licensee must be paid for. And so far as the consumer is concerned, Petitioner's argument appears to be based on a misconception in suggesting that the Federal Power

Commission fixes rates charged by the licensee. Those rates are fixed by the New York State Public Service Commission and Section 19 of the Act expressly denies to the Federal Power Commission jurisdiction over such matters where as here the State has provided a commission for that purpose.

Furthermore, the effect of the Commission's action is to diminish the value of Respondent's property and assets—and thus the equity of its stockholders—by requiring it to accrue into amortization reserve, as "surplus" or "excess" earnings, amounts which in the one case it never received as project revenues, and which in the other case it in fact has already paid out under a valid and subsisting contractual obligation. The present effect is to reduce Respondent's corporate surplus and earnings available for dividends and other corporate purposes by $399,000 as of December 31, 1946; and the potential effect, over the remaining years of the license period, may amount to a substantial additional reduction. This injury to Respondent and its stockholders is no less important because Petitioner has chosen to ignore it.

Thus the end result of the Commission's action is to deprive Respondent and its stockholders of their property without due process of law, contrary to and in violation of the Constitution of the United States and the Fifth Amendment thereto. There is no claim here that property was taken for a public purpose within the meaning of the Fifth Amendment; but private property has been destroyed without compensation, and such a destruction is not permitted by the Fifth Amendment.

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CONCLUSION

For the above reasons the judgment of the Court below should be affirmed.

Respectfully submitted,

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October, 1953.

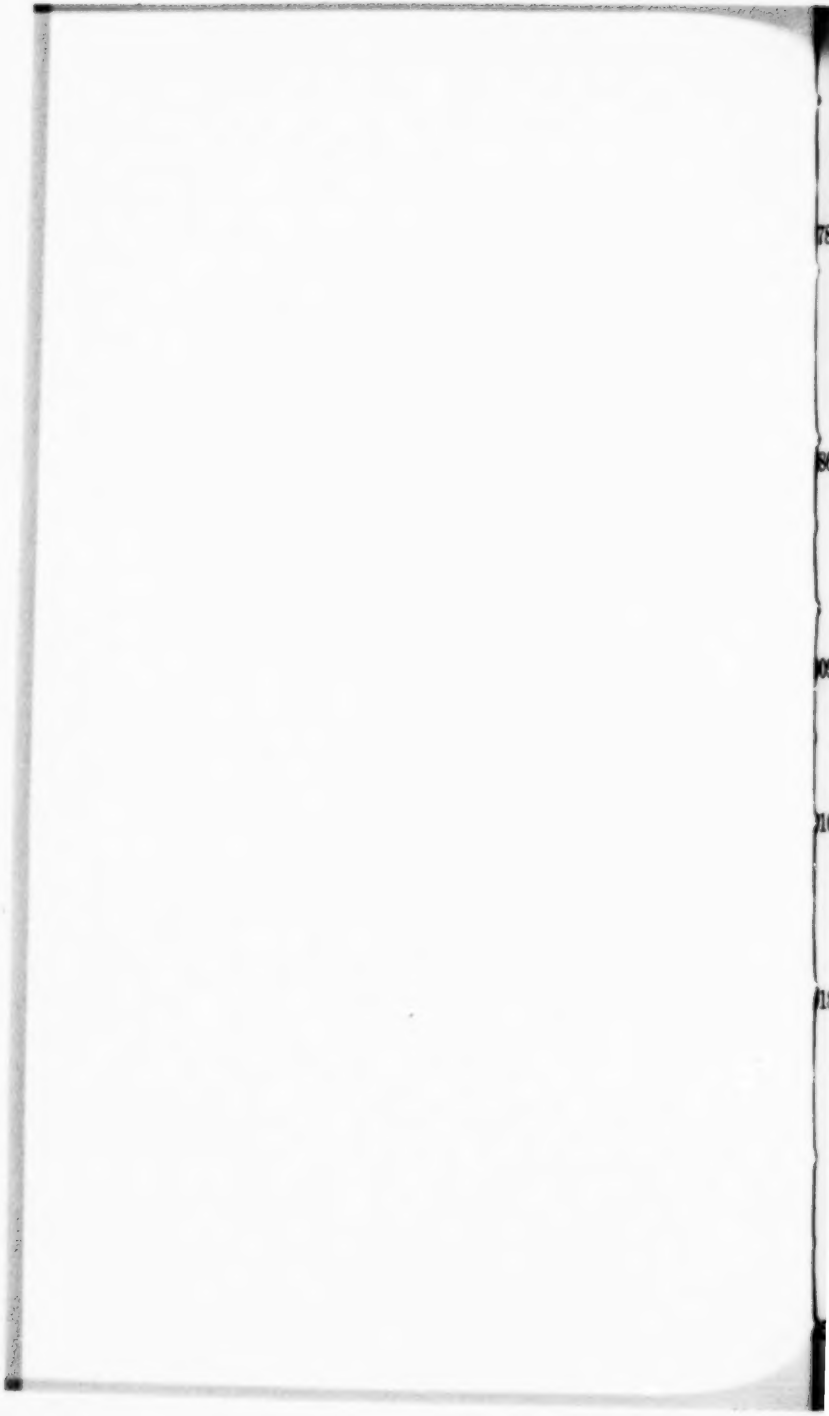

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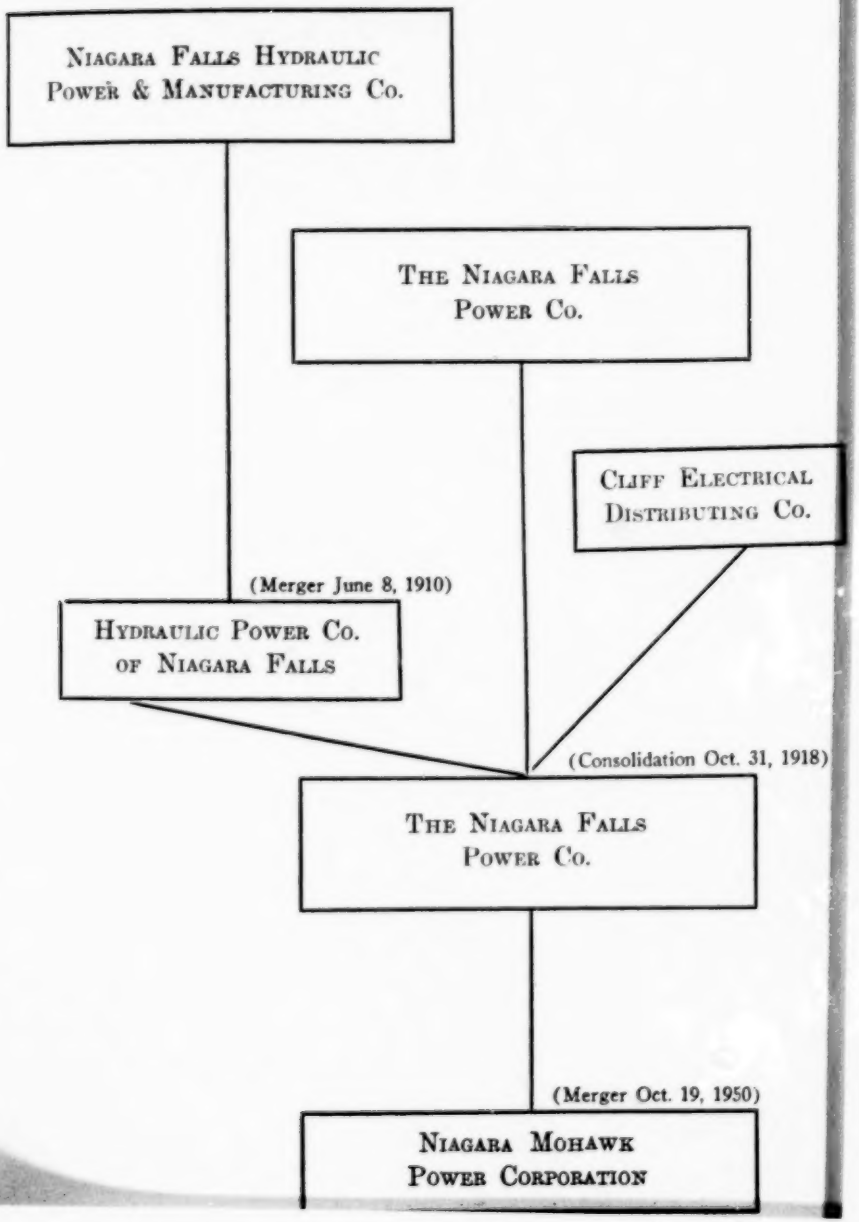
CHART

CHART OF RESPONDENT'S PREDECESSOR COMPANIES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The Niagara Falls Power Co.
Cliff Electrical Distributing Co.
(Merger June 8, 1910)
Hydraulic Power Co. of Niagara Falls
(Consolidation Oct. 31, 1918)
The Niagara Falls Power Co.
(Merger Oct. 19, 1950)
Niagara Mohawk Power Corporation

COPY BOUND CLOSE TO EDGE

CHART I

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(730 cfs)

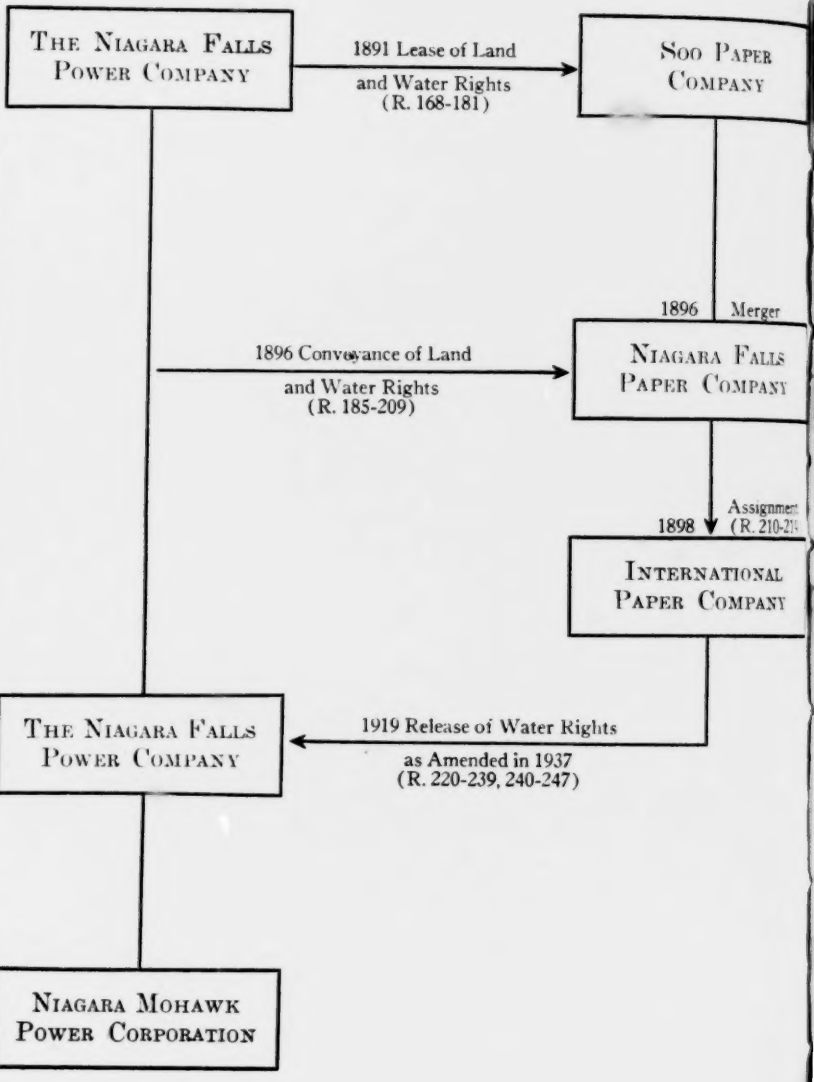

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CHART C

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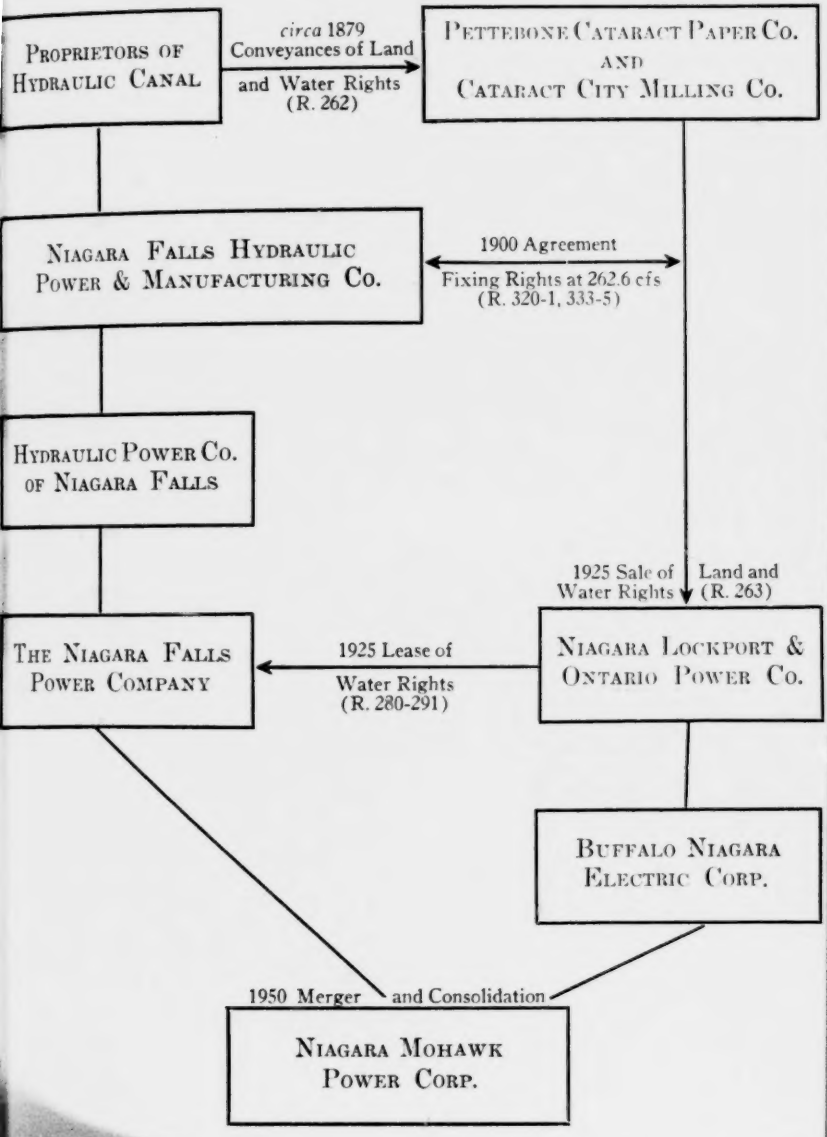
(262.6 cfs)


PROPRIETORS OF HYDRAULIC CANAL
circa 1879 Conveyances of Land and Water Rights (R. 262)
PETTEBONE CATARACT PAPER CO. AND CATARACT CITY MILLING CO.
NIAGARA FALLS HYDRAULIC POWER & MANUFACTURING CO.
1900 Agreement Fixing Rights at 262.6 cfs (R. 320-1, 333-5)
HYDRAULIC POWER CO. OF NIAGARA FALLS
1925 Sale of Land and Water Rights (R. 263)
THE NIAGARA FALLS POWER COMPANY
1925 Lease of Water Rights (R. 280-291)
NIAGARA LOCKPORT & ONTARIO POWER CO.
BUFFALO NIAGARA ELECTRIC CORP.
1950 Merger and Consolidation
NIAGARA MOHAWK POWER CORP.